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No. 03-304

In the Supreme Court of the United States

PAULA WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction of bank fraud.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the *Federal Reporter* but is reprinted in 59 Fed. Appx. 765.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2003. A petition for rehearing was denied on May 27, 2003 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on August 22, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner

was convicted of conspiring to commit bank fraud, in violation of 18 U.S.C. 371, and bank fraud, in violation of 18 U.S.C. 1344. She was sentenced to five months of imprisonment. Pet. App. 6a-8a. The court of appeals affirmed her convictions. *Id.* at 1a-5a.

1. To qualify for a loan under the federally guaranteed loan program, a prospective student completes various forms certifying that she will use the loan proceeds to pay educational expenses while attending the school listed on the application on at least a half-time basis. The student sends the application to the educational institution, which completes the relevant portions, and then forwards the completed application to a guaranty agency. The guaranty agency sends the application to a bank, which issues the loan. Gov't C.A. Br. 4-5.

At the time that the loan involved in this case was made, if the borrower defaulted on the loan, the guaranty agency would reimburse the bank for 98% of the unpaid principal and interest due from the borrower. See 34 C.F.R. 682.401(b)(14) (1998); see also 20 U.S.C. 1078(b)(1)(G). The guaranty agency could, in turn, seek reimbursement from the United States Department of Education. Gov't C.A. Br. 5. In addition, the Secretary of Education paid all interest to the lender on behalf of the borrower while the borrower was in school, and during other periods prescribed by statute or regulation, such as periods of unemployment or economic hardship. 20 U.S.C. 1078(a) and (b)(1)(M); 34 C.F.R. 682.210, 682.300. If, however, the bank discovered that the borrower provided false or erroneous information so that the borrower was ineligible for the loan, the bank was required to refund the interest received from the Secretary. 34 C.F.R. 682.412(d) and (e) (1998).

In 1996, petitioner applied for student loans to attend the Autonomous School of Medical Sciences of Central America in Costa Rica (School of Medical Sciences). C.A. App. 78; Gov't C.A. Br. 4. The Michigan Guaranty Agency forwarded petitioner's applications to the Michigan National Bank, which approved loans totaling $17,000. C.A. App. 78; Gov't C.A. Br. 5. As a result, petitioner received and negotiated checks totaling $16,320. C.A. App. 86-87; Gov't C.A. Br. 5. She never applied to nor enrolled in the School of Medical Sciences. Gov't C.A. Br. 4, 6. Although petitioner made some payments on the loans, she failed to keep up with the payments due and eventually defaulted on the loans. *Id.* at 7; C.A. App. 137.

2. A federal grand jury in the Eastern District of Michigan charged petitioner with conspiring to commit bank fraud, in violation of 18 U.S.C. 371, and bank fraud, in violation of 18 U.S.C. 1344. C.A. App. 25-35. The bank fraud count charged that petitioner "did knowingly execute and attempt to execute a scheme to obtain moneys and funds under the custody and control of a financial institution by means of false and fraudulent pretenses and representations in that [petitioner and a co-defendant] submitted, and aided and abetted each other in submitting, a fraudulent application for federally guaranteed student loans for [petitioner] to Michigan National Bank." *Id.* at 29-30.

At the close of the government's case, petitioner moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29 based on the government's purported failure to prove that petitioner signed the student loan application and the promissory notes. The district court denied the motion. C.A. App. 1010-1012. The jury found petitioner guilty on both counts, and the district court sentenced petitioner to concurrent prison

terms of five months on each of the charges. Pet. App. 6a-8a.

3. On appeal, petitioner challenged, among other things, the sufficiency of the evidence on the bank fraud conviction. The court of appeals held that it was reasonable for the jury to find that petitioner intended to defraud the bank when she submitted a student loan application with no intention to use the proceeds for school. Pet. App. 2a-3a.

The court of appeals rejected petitioner's argument, raised for the first time on appeal, that the government did not prove that she intentionally subjected the bank to a risk of loss. Pet. App. 3a. Relying on its earlier decision in *United States* v. *Everett*, 270 F.3d 986 (6th Cir. 2001), cert. denied, 537 U.S. 828 (2002), the court held that there is no requirement that the government prove that the defendant intended to expose the bank to a risk of loss. Rather, the court stated, the government must prove only that the defendant, in the course of committing a fraud, caused a bank to transfer funds under its control. Pet. App. 3a. The court found that this requirement was satisfied here because petitioner's "fraudulent conduct caused the bank to issue student loan checks to persons who had not applied to or enrolled in the school" identified in the loan application. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-15) that this Court should grant a writ of certiorari in this case to resolve a conflict among the courts of appeals concerning the scope of the bank fraud statute. She contends that the Sixth Circuit erred and departed from the rule followed in other courts by stating that the bank fraud statute is violated when "the defendant in the course of commit-

ting fraud on *someone* causes a federally insured bank to transfer funds under its possession and control." Pet. App. 3a (quoting *United States* v. *Everett*, 270 F.3d 986, 991 (6th Cir. 2001), cert. denied, 537 U.S. 828 (2002)). Although the courts of appeals disagree on whether causing or intending to cause a risk of loss to a financial institution is an element of bank fraud, this case is not an appropriate one to resolve that disagreement. The court of appeals correctly held that causing or intending to cause a risk of loss is not an element of bank fraud. But even courts of appeals that construe the statute more narrowly have held that the conduct for which petitioner was convicted—presenting fraudulent documents to a bank in order to obtain a loan—constitutes bank fraud. The disagreement among the courts of appeals concerns a factual scenario not present in this case—where the bank is not the target of the defendant's deception but is an unwitting instrument in a fraud against a third party. This Court's review is therefore not warranted.

1. The bank fraud statute makes it a crime "knowingly [to] execute[], or attempt[] to execute, a scheme or artifice—(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1344. The statute thus prohibits "any 'scheme or artifice to defraud a financial institution' or to obtain any property of a financial institution 'by false or fraudulent pretenses, representations, or promises.'" *Neder* v. *United States*, 527 U.S. 1, 21 (1999). Congress intended the statute, like the mail and wire fraud statutes, to have a broad scope. See S. Rep. No. 225, 98th Cong., 1st Sess. 378-379 (1983). It has been construed

to encompass a variety of fraudulent schemes that undermine the integrity of the banking system. See *United States* v. *Brandon*, 17 F.3d 409, 426 (1st Cir.), cert. denied, 513 U.S. 820 (1994); *United States* v. *Rackley*, 986 F.2d 1357, 1361 (10th Cir.), cert. denied, 510 U.S. 860 (1993).

This Court has not defined the intent that a defendant must possess in order to violate the bank fraud statute. Nevertheless, the Court's interpretation of the analogous mail fraud statute makes clear that the essence of a bank fraud scheme is "the deprivation of something of value by trick, deceit, chicane or overreaching." *McNally* v. *United States*, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)). For that reason, several courts of appeals have held that the intent necessary for a bank fraud conviction "is an intent to deceive the bank in order to obtain from it money or other property." *United States* v. *Kenrick*, 221 F.3d 19, 26-27 (1st Cir.) (en banc), cert. denied, 531 U.S. 961 (2000); see *United States* v. *McCauley*, 253 F.3d 815, 819 (5th Cir. 2001) ("The requisite intent to defraud is established if the defendant acted knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to himself.") (citation omitted); *United States* v. *LaMarre*, 248 F.3d 642, 649 (7th Cir.) ("'[s]pecific intent to defraud' means that a defendant acted willfully and with specific intent to deceive or cheat"), cert. denied, 533 U.S. 963 (2001); *United States* v. *Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987) ("[t]he bank fraud statute condemns schemes designed to deceive in order to obtain something of value").

There is some disagreement among the courts of appeals concerning the intent necessary to constitute

bank fraud in certain circumstances. The disagreement concerns whether, in order to establish that the defendant possessed the requisite intent to defraud, the government must prove that the defendant exposed, or intended to expose, a bank to the risk of financial loss. The First, Sixth, Ninth, Tenth, and Eleventh Circuits have rejected such a requirement. See *United States* v. *McNeil*, 320 F.3d 1034, 1037-1039 (9th Cir.), cert. denied, No. 02-10904 (Oct. 6, 2003); *United States* v. *Everett*, 270 F.3d 986, 991 (6th Cir. 2001), cert. denied, 537 U.S. 828 (2002); *United States* v. *De La Mata*, 266 F.3d 1275, 1298 (11th Cir. 2001), cert. denied, 535 U.S. 989 (2002); *Kenrick*, 221 F.3d at 29; *United States* v. *Sapp*, 53 F.3d 1100, 1103 (10th Cir. 1995), cert. denied, 516 U.S. 1082 (1996). The Second, Third, Fifth, and Seventh Circuits, in contrast, have held that the government must prove, as an element of the offense, either that the defendant intended to expose the bank to an actual or potential loss, *United States* v. *Thomas*, 315 F.3d 190, 200 (3d Cir. 2002); *United States* v. *Laljie*, 184 F.3d 180, 189 (2d Cir. 1999); *United States* v. *Rodriguez*, 140 F.3d 163, 168 (2d Cir. 1998), or that the defendant placed the bank at risk of civil liability, *United States* v. *Odiodio*, 244 F.3d 398, 401 (5th Cir. 2001); *United States* v. *Sprick*, 233 F.3d 845, 852 (5th Cir. 2000); *United States* v. *Davis*, 989 F.2d 244, 246-247 (7th Cir. 1993).[1]

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[1] Petitioner is thus incorrect in asserting (Pet. 6, 11-12) that the majority of courts of appeals have endorsed the approach that he advocates. The cases petitioner cites from the First and Eleventh Circuits (*United States* v. *Brandon*, 17 F.3d 409 (1st Cir.), cert. denied, 513 U.S. 820 (1994), and *United States* v. *Key*, 76 F.3d 350 (11th Cir. 1996)) predate the cases from those circuits explicitly addressing the issue that are discussed in the text above. The Fourth Circuit, in upholding a bank fraud conviction based on the

2. This case is not an appropriate vehicle for this Court to resolve the disagreement among the courts of appeals for two reasons. First, the court of appeals correctly rejected petitioner's contention that exposing the bank to the risk of loss is a required element of bank fraud; and, second, this case does not involve the factual situation that has given rise to the disagreement among the courts of appeals.

a. The court below correctly held that a violation of the bank fraud statute does not require that the bank be exposed to a risk of financial loss. Nothing in the text of the statute suggests that a risk of loss is a component of the offense. See 18 U.S.C. 1344. On the contrary, "[a]ll the statute facially seems to require in a case involving property in the custody or control of a bank, is that there be an attempt to obtain such property from the bank by deceptive means." *McNeil*, 320 F.3d at 1037.

As this Court has noted, the statute does not "define[] the phrase 'scheme or artifice to defraud.'" *Neder*, 527 U.S. at 20. But, assuming, as the Court did in *Neder*, *id.* at 21-23, that Congress used the phrase in

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negotiation of forged checks, has stated that "expos[ing]" the bank "to an actual or potential risk of loss" is a required element of bank fraud. *United States* v. *Brandon*, 298 F.3d 307, 312 (4th Cir. 2002) (quoting *United States* v. *Colton*, 231 F.3d 890, 908 (4th Cir. 2000)). But that court has not, as far as the government is aware, reversed a bank fraud conviction based on lack of proof of that element. In *United States* v. *Orr*, 932 F.2d 330 (4th Cir. 1991), cited by petitioner (Pet. 11), the court of appeals reversed the conviction because the defendant's conduct consisted merely of passing checks drawn on insufficient funds, which the court held was not covered under the bank fraud statute. The Eighth Circuit also has not definitively addressed the risk-of-loss issue, although it has held that the bank need not suffer an actual loss. See *United States* v. *Ponec*, 163 F.3d 486, 487 (8th Cir. 1998) (cited at Pet. 13).

accordance with its common-law meaning, the intent element of common-law fraud entails only the "intention to induce the plaintiff to act or to refrain from action in reliance upon the misrepresentation." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (*Prosser*) § 105, at 728 (5th ed. 1984); see *Kenrick*, 221 F.3d at 28; Restatement (Second) of Torts § 525 (1977) ("One who fraudulently makes a representation * * * for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit."). "[C]ommon-law fraud had no additional 'intent to harm' requirement." *Kenrick*, 221 F.3d at 28 (citing *Prosser* § 107, at 741, and 2 Charles G. Addison, *A Treatise on the Law of Torts* § 1174, at 404 (1881)). Thus, the intent element of common-law fraud provides no basis for a requirement that the government prove that the defendant intended to, or did, expose the bank to a risk of loss. Nor can that requirement be drawn from the reliance or damages elements of common-law fraud, because, as this Court has explained, those elements "plainly have no place in the federal fraud statutes," which prohibit not completed fraud but rather a "scheme to defraud." *Neder*, 527 U.S. at 25. In short, there is no basis in the statutory text or the common law for a risk-of-loss requirement.

b. This Court's review is also not warranted because this case does not involve the factual scenario that has led to the disagreement among the courts of appeals. That disagreement has arisen in cases involving fraud on a third party where the bank was not the "target of deception" but merely an "unwitting instrumentality" in the fraud. *United States* v. *Khorozian*, 333 F.3d 498, 505 (3d Cir.) (quoting *Thomas*, 315 F.3d at 201, and discussing cases), cert. denied, No. 03-398 (Oct. 20, 2003);

see *De La Mata*, 266 F.3d at 1298. For example, in *United States* v. *Blackmon*, 839 F.2d 900 (2d Cir. 1988), on which petitioner relies (Pet. 8), the defendants deceived elderly women into withdrawing money from their personal bank accounts, converting the money to foreign currency, and giving that foreign currency to the defendants; the defendants did not deceive the banks in any way. See *id.* at 902-903. This case, in contrast, involves a relatively common type of bank fraud in which the defendant deceives the bank itself into making bank funds available by submitting fraudulent documents that contain a material misstatement or conceal material information.

All of the courts of appeals that have addressed the issue (including those that impose a risk-of-loss element) agree that such a defendant commits bank fraud. See, *e.g.*, *Kenrick*, 221 F.3d at 29-32; *United States* v. *Chacko*, 169 F.3d 140 (2d Cir. 1999); *United States* v. *Bales*, 813 F.2d 1289 (4th Cir. 1987); *United States* v. *Harvard*, 103 F.3d 412 (5th Cir.), cert. denied, 522 U.S. 824 (1997); *United States* v. *Todosijevic*, 161 F.3d 479 (7th Cir. 1998).

Furthermore, the courts of appeals agree that a defendant who deceives a bank to obtain bank funds commits bank fraud even if the funds that he obtains are fully secured or he expects that they will be repaid. See *United States* v. *Walker*, 871 F.2d 1298, 1304-1307 (6th Cir. 1989) (defendant committed bank fraud because he deceived bank to obtain loans for friends even though borrowers were creditworthy, had the ability to repay the loans, and understood their obligation to do so); *United States* v. *Hollis*, 971 F.2d 1441, 1452-1453 (10th Cir. 1992) ("if a defendant knowingly provided materially false information in order to induce the loan, the crime is complete, and it is irrelevant whether or

not he intended to repay it or was capable of repaying it"), cert. denied, 507 U.S. 985 (1993); *United States* v. *Saks*, 964 F.2d 1514, 1518 (5th Cir. 1992) (defendant committed bank fraud even though loan obtained by deceiving bank was "amply secured").

Petitioner's argument that she did not commit bank fraud because the loan that she fraudulently obtained was indemnified by the guarantee agency is tantamount to a contention that a defendant commits bank fraud only if the bank suffers an actual and permanent loss. But even the courts of appeals that take a narrow view of the scope of the bank fraud statute have held that a showing of actual loss is not required. See, *e.g.*, *Khorozian*, 333 F.3d at 505 n.6; *United States* v. *Brandon*, 298 F.3d 307, 312 (4th Cir. 2002); *McCauley*, 253 F.3d at 820; *United States* v. *Stavroulakis*, 952 F.2d 686, 694 (2d Cir.), cert. denied, 504 U.S. 926 (1992); *United States* v. *LeDonne*, 21 F.3d 1418, 1425 (7th Cir.), cert. denied, 513 U.S. 1020 (1994). Courts of appeals that require that a bank be exposed to a risk of loss have also held that the risk of loss may be slight. See *McCauley*, 253 F.3d at 820; *United States* v. *Jacobs*, 117 F.3d 82, 93 (2d Cir. 1997); *United States* v. *Barakett*, 994 F.2d 1107, 1111 n.15 (5th Cir. 1993), cert. denied, 510 U.S. 1049 (1994).[2]

In this case, the bank from which petitioner fraudulently obtained her student loans not only faced a risk of loss but suffered an actual loss. The bank disbursed checks totaling $16,320. Petitioner did not fulfill her

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[2] Those courts have also made clear that the bank need not be the primary victim of the defendant's fraud. See *United States* v. *Crisci*, 273 F.3d 235, 240 (2d Cir. 2001); *Barakett*, 994 F.2d at 1111. Thus, petitioner is mistaken in contending (Pet. 15) that her scheme was not bank fraud because the primary victim of the scheme was the Department of Education.

obligations to repay the loans and ultimately defaulted on the loans. As a result, under federal regulations, the bank was entitled to reimbursement for only 98% of the unpaid principal and interest balance. See 34 C.F.R. 682.401(b)(14) (1998). In addition, because petitioner was not actually eligible to receive the loans, the bank was required by federal regulations to repay the interest benefits that the bank had received from the federal government. 34 C.F.R. 682.412(d) and (e) (1998). Because the bank both faced the risk of financial loss and actually suffered financial loss from petitioner's conduct, that conduct constituted bank fraud even under the most stringent view of the bank fraud statute.

The court of appeals' conclusion here that petitioner "acted with an intent to defraud the bank[]" (Pet. App. 3a) thus does not conflict with the decision of any other court of appeals. It is therefore premature for this Court to review the Sixth Circuit's broader statement that the bank fraud statute is violated whenever "the defendant in the course of committing fraud on *someone* causes a federally insured bank to transfer funds under its possession and control." *Ibid.* (quoting *Everett*, 270 F.3d at 991); see *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) (Court "reviews judgments, not statements in opinions").

3. Petitioner erroneously contends (Pet. 17-18) that applying the bank fraud statute without requiring proof that the bank was exposed to a risk of loss "run[s] afoul of the federalism concerns expressed in *United States* v. *Lopez*, 514 U.S. 549, 557 (1995)." As discussed above, this case does not implicate that contention, because the bank faced a risk of loss and indeed suffered an actual loss as a result of petitioner's deception. Moreover, even if the conduct involved in a bank fraud cause may be prosecuted in state court, that fact does not preclude

federal prosecution. See *United States* v. *Morgenstern*, 933 F.2d 1108, 1113 (2d Cir. 1991) ("While [defendant's] conduct could have been handled in state court as a simple case of business fraud, this does not preclude treating it as an instance of federal bank fraud if the relevant statutory elements are satisfied."), cert. denied, 502 U.S. 1101 (1992). The bank fraud statute is designed to protect banks from becoming the victims of deception, and it is therefore properly applied whenever a defendant deceives the bank in order to obtain funds under the bank's custody and control. Cf. *United States* v. *Schwartz*, 899 F.2d 243, 247 (3d Cir.) (depositing worthless checks into an account and making withdrawals from that account "cannot be simply dismissed as a 'garden-variety' state case because the product grown here was money which sprouted from worthless checks in circumstances which Congress intended to interdict by the bank fraud statute"), cert. denied, 498 U.S. 901 (1990).

Petitioner also errs in contending (Pet. 16, 18-19) that not requiring a risk of loss contravenes the statute's legislative history. Nothing in the purposes of the bank fraud statute warrants departing from its text by confining its scope to cases in which the bank is exposed to a risk of loss. Congress sought to "assure effective prosecution of the range of fraudulent crimes commonly committed today against federally controlled or insured financial institutions" and thereby to "assure the integrity of the Federal banking system." S. Rep. No. 225, 98th Cong., 1st Sess. 379 (1983). Congress intended that the bank fraud statute would be construed "to reach a wide range of fraudulent activity" and to fill gaps left by existing federal criminal laws. *Id.* at 378; see *id.* at 377. Congress could reasonably conclude, as the text of the bank fraud statute indicates, that ensuring the

integrity of federally controlled and insured financial institutions requires criminalizing *all* attempts to use deception to obtain assets within their custody or control, whether or not the government is able to prove, in a particular case, that the attempt has exposed the bank to a potential loss.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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